

1 Ara Sahelian, Esq., [CBN 169257]  
2 SAHELIAN LAW OFFICES  
23276 South Pointe Drive, Suite 216  
3 Laguna Hills, CA 92653  
4 949. 859. 9200  
5 e-mail: sahelianlaw@me.com  
6 Attorneys for Fogo De Chao Churrascaria (San Jose) LLC  
7  
8

9 **UNITED STATES DISTRICT COURT**  
10 **CALIFORNIA NORTHERN DISTRICT**  
11 **(San Jose Courthouse)**

12  
13  
14  
15 Scott Johnson,

16 Plaintiff,

17  
18 vs.

19 Fogo De Chao Churrascaria (San  
20 Jose) LLC  
21

22 Defendant.  
23  
24  
25  
26  
27  
28

CASE NO.: 5:21-cv-02859-BLF

The Honorable Beth Labson Freeman

**POINTS AND AUTHORITIES TO  
MOTION TO DISMISS**

Hearing Date: 9/30/21

Time: 9:00 AM

**POINTS AND AUTHORITIES TO**  
**MOTION TO DISMISS [FRCP 12(b)1]**

**I. INTRODUCTION**

This Motion is being made on behalf of Fogo De Chao Churrascaria (San Jose) LLC (hereinafter also "Defendant"). Plaintiff, Scott Johnson, (hereinafter also "Johnson"), filed the instant action against Defendant, in relation to a property located at 377 Santana Row, San Jose (hereinafter also, "Property"), asserting claims for “the Americans with Disabilities Act; the Unruh Civil Rights Act .”

**II. BACKGROUND**

Johnson alleges he is confined to a wheelchair, and that he was unable to dine outdoors at Fogo de Chao restaurant (hereinafter "Restaurant"). Johnson considers himself a "Tester," and alleges that he intends to return to the restaurant once the "barriers" are removed. Johnson's allegation that he was denied full and equal access is implausible. Exhibits B and C depict the outdoor dining area. Johnson could have easily sat at the table circled in red. Johnson's other option was to sit at a table, with its leaves extended, providing him with ample knee and toe clearance (See Exhibit D). The Americans with Disabilities Accessibility Guidelines require no more than

1 17 inches in knee and toe clearance (see Exhibit E). Here, he has 23 inches  
2 of knee and toe clearance, yet he alleges he was unable to dine because of  
3 insufficient toe and knee clearance.  
4

5 To demonstrate the implausibility of Johnson's allegation, Defendant  
6 purchased an ordinary wheelchair, (see Exhibit F), and positioned the  
7 wheelchair at an ordinary dining table, even one without its leaves extended.  
8 The wheelchair slid under the table far enough to allow the user to dine  
9 comfortably.  
10

11 The Restaurant's customers other than Johnson who are confined to  
12 wheelchairs do not seemed to have any difficulty using its ordinary tables  
13 (see Exhibit G). Johnson could have as well.  
14

15 Johnson does not allege the reason why he was unable to dine at the  
16 Restaurant, other than stating that there was "insufficient knee and toe  
17 clearance." He is silent as to the extent to which the space provided for his  
18 knees and toes was insufficient, and how he arrived at that conclusion. For  
19 instance, did he attempt to use the tables? If so, what did he experience?  
20 The parties have had an opportunity to discuss the issues relative to outdoor  
21 dining. Johnson has refused to dismiss the action. (See Exhibit A for a true  
22  
23  
24  
25  
26  
27  
28

1 and correct copy of the request).

2  
3 **III. DISCUSSION**

4 There are 279 pages to The 2010 ADA Standards for Accessible Design  
5 (the Guidelines) published by the Department of Justice, and 170 pages to  
6 the Guidance on the 2010 ADA Standards for Accessible Design. A single  
7 deviation, however minor, from any provision found in their pages, provides  
8 the pretext for one of a handful of plaintiff's firms, filing these cases on an  
9 industrial scale, to cash-in.  
10  
11  
12

13 To be clear, a violation of the Guidelines, alone, does not make a lawsuit.  
14 While a plaintiff may obtain an injunction against impending  
15 discrimination, this "does not transform the ADA into an open-ended  
16 private attorney general statute, because the scope of such an injunction is  
17 limited." *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 953 (9th Cir.  
18 2011) (en banc). A plaintiff must plead harm that is concrete (not abstract),  
19 and particularized. Johnson pleads no such harm. The case must be  
20 dismissed. Johnson cannot vindicate the rights of disabled persons  
21 generally. The Attorney General is "the proper entity to bring such an  
22 action." 42 U.S.C. § 12188(b) ("Enforcement by Attorney General"). Even a  
23  
24  
25  
26  
27  
28

1 "tester" plaintiff may not sue a business for injunctive relief simply because  
2 an ADA violation exists.  
3

4 **a. Failure to State a Claim Pursuant to Rule 12(b)(6)**

5 In the initial complaint, Johnson alleges that on the dates of his visits  
6 "the defendants failed to provide wheelchair accessible dining surfaces in  
7 conformance with the ADA Standards as it relates to wheelchair users like  
8 the plaintiff." ¶10; that what he encountered "is the lack of sufficient knee  
9 or toe clearance under the dining surfaces located outside in the patio in  
10 front of the Restaurant for wheelchair users." And that he "believes that  
11 there are other features of the dining surfaces that likely fail to comply with  
12 the ADA Standards ..." ¶12.  
13

14 The Complaint was amended:  
15

16 Paragraph 11 was amended from "The Restaurant provides dining  
17 surfaces to its customers but fails to provide any wheelchair accessible  
18 dining surfaces." to "The Restaurant provides dining surfaces to its  
19 customers but fails to provide any wheelchair accessible dining surfaces.  
20 The Restaurant provides both indoor and outdoor seating as a privilege to its  
21 customers."  
22  
23  
24  
25  
26  
27  
28

1 Paragraph 12 was amended from “One problem that plaintiff encountered  
2 is the lack of sufficient knee or toe clearance under the dining surfaces  
3 located outside in the patio in front of the Restaurant for wheelchair users.”  
4 to “One problem that plaintiff encountered is the lack of sufficient knee or  
5 toe clearance under the dining surfaces located outside in the patio in front  
6 of the Restaurant for wheelchair users. Plaintiff desired to eat outside  
7 because he enjoys the views and patio dining experience. The tables had a  
8 pedestal style support that did not provide enough knee and/or toe clearance.  
9 Without this clearance, it is difficult for plaintiff to pull under the table. This  
10 means that plaintiff has to sit relatively far from the table making dining  
11 difficult. Plaintiff risks spilling his food, which is embarrassing and  
12 frustrating.”  
13

14 Paragraph 33 was removed from the FAC, in the Complaint it read  
15 “Although the plaintiff encountered frustration and difficulty by facing  
16 discriminatory barriers, even manifesting itself with minor and fleeting  
17 physical symptoms, the plaintiff does not value this very modest physical  
18 personal injury greater than the amount of the statutory damages.”  
19

20 Federal Rule of Civil Procedure 8(a)(2) requires a complaint to include  
21  
22  
23  
24  
25  
26  
27  
28

1 "a short and plain statement of the claim showing that the pleader is entitled  
2 to relief." Fed. R. Civ. P. 8(a)(2). A complaint that fails to meet this  
3 standard may be dismissed pursuant to Rule 12(b)(6). See Fed. R. Civ. P. 12  
4 (b)(6). To overcome a Rule 12(b)(6) motion to dismiss after the Supreme  
5 Court's decisions in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L.  
6 Ed. 2d 868 (2009) and *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544,  
7 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), a plaintiff's "factual allegations  
8 [in the complaint] 'must . . . suggest that the claim has at least a plausible  
9 chance of success.'" *Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1135 (9th Cir. 2014)  
10 (emphasis added). The court "accept[s] factual allegations in the complaint  
11 as true and construe[s] the pleadings in the light most favorable to the  
12 nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d  
13 1025, 1031 (9th Cir. 2008). But "allegations in a complaint . . . may not  
14 simply recite the elements of a cause of action [and] must contain sufficient  
15 allegations of underlying facts to give fair notice and to enable the opposing  
16 party to defend itself effectively." *Levitt*, 765 F.3d at 1135 (quoting *Eclectic*  
17 *Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996 (9th Cir.  
18 2014)). "A claim has facial plausibility when the Plaintiff pleads factual  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 content that allows the court to draw the reasonable inference that the  
2 Defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. "The  
3 plausibility standard is not akin to a 'probability requirement,' but it asks for  
4 more than a sheer possibility that a defendant has acted unlawfully." *Id.*  
5 (quoting *Twombly*, 550 U.S. at 556).  
6

7  
8 The Complaint alleges that Johnson was unable to dine at the patio.  
9  
10 Johnson's allegation is implausible in view of the many options at his  
11 disposal. (see Exhibits B, C, and F). The allegation simply recites the  
12 elements of an ADA cause of action without more. For instance, what is the  
13 knee clearance that Johnson requires? What is the toe clearance? How far  
14 away from the edge of the table does he prefer sitting?  
15

16  
17 It is not sufficient for a pleading to "simply recite the elements of a cause  
18 of action." *Starr v. Baca*, 652 F.3d 1202, 1216. Complaints must "plausibly  
19 suggest an entitlement to relief, such that it is not unfair to require the  
20 opposing party to be subjected to the expense of discovery and continued  
21 litigation." *Id. Whitaker v. Tesla Motors, Inc.*, 985 F.3d 1173, 1177.  
22

23  
24 *Tesla* is one of three similar decisions by the Ninth Circuit holding that  
25 formulaic pleadings commonly seen in ADA cases do not satisfy Rule 8's  
26  
27  
28



1 requirement. *Whitaker v. Pan. Joes Inv'rs LLC*, 2021 U.S. App. LEXIS  
 2 1985 (9th Cir. 2020), and *Whitaker v. Body, Art & Soul Tattoos L.A., LLC*,  
 3 2021 U.S. App. LEXIS 1991 (9th Cir. 2020), are the other two. (Defendant  
 4 Body, Art & Soul Tattoos was represented by the undersigned on appeal).  
 5  
 6 All three cases provide that the stringent pleading standard established by  
 7 *Iqbal/Twombly* apply to disability access plaintiffs' allegations.  
 8  
 9

10 **b. The Complaint Is Also Jurisdictionally Defective and Subject to**  
 11 **Dismissal under Federal Rule of Civil Procedure 12(b)(1)**  
 12

13 “[A] disabled individual claiming discrimination must satisfy the case or  
 14 controversy requirement of Article III by demonstrating his standing to sue  
 15 at each stage of the litigation.” *Chapman*, 631 F.3d 939, 946. To establish  
 16 standing, a plaintiff must allege that he or she: “(1) suffered an injury in  
 17 fact, (2) that is fairly traceable to the challenged conduct of the defendant,  
 18 and (3) that is likely to be redressed by a favorable judicial decision.”  
 19  
 20 *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547 (2016). “Where, as here, a case  
 21 is at the pleading stage, the plaintiff must clearly . . . allege facts  
 22 demonstrating each element.” *Id.* In the context of Americans with  
 23 Disabilities Act (“ADA”) actions, where a private litigant is only entitled to  
 24  
 25  
 26  
 27  
 28

1 injunctive relief, the plaintiff “must additionally demonstrate a sufficient  
2 likelihood that he will again be wronged in a similar way. That is, the  
3 plaintiff must establish a real and immediate threat of repeated injury.”

4 *Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1081 (9th Cir. 2004).

5  
6 At this writing we are left in the dark as to how Johnson was denied full  
7 and equal access. Bare allegations are insufficient to establish “a  
8 particularized injury that affect[s] the plaintiff in a personal and individual  
9 way.” *Safer Chemicals, Healthy Families v. U.S. Env'tl. Prot. Agency*, 943  
10 F.3d 397, 411 (9th Cir. 2019) (internal quotation marks omitted).

11  
12 [w]hile [the court is] mindful of the generous pleading  
13 standards that apply to civil rights plaintiffs, a liberal  
14 interpretation of a . . . civil rights complaint may not supply  
15 essential elements of the claim that were not initially pled. . . .  
16 Although [plaintiff] alleges that he is physically disabled, and  
17 that he . . . [personally] encountered architectural barriers that  
18 denied him full and equal access, he never alleges what those  
19 barriers were and how his disability was affected by them so as  
20 to deny him the full and equal access that would satisfy the  
21 injury-in-fact requirement (i.e., that he personally suffered  
22 discrimination under the ADA on account of his disability).

23 *Chapman*, 631 F.3d at 954. Johnson concludes that he was denied full  
24 and equal access, but fails to allege any facts which, if true, would  
25 demonstrate this legal conclusion. Johnson's “formulaic recitation” of the  
26  
27  
28

1 elements of an ADA claim “fails to sufficiently allege the essential  
2 elements of Article III standing.” *Chapman*, 631 F.3d at 954.  
3

4 A factual jurisdictional challenge is in order. The Americans with  
5 Disabilities Accessibility Guidelines (“Guidelines”) require 17 inches below  
6 table clearance to allow for a wheelchair to slide under the table. 11 inches  
7 for knee clearance (horizontally) plus 6 inches for toe. (see Exhibit E). Here,  
8 distance between the center support column and the edge of a table  
9 measures 23 inches. Fully six inches more that required by the Guidelines  
10 (see Exhibit D). With the round leaf retracted, that distance is reduced to 16  
11 inches, a trifle shy of the 17 inches required by the Guidelines. In resolving  
12 a factual dispute as to the existence of subject matter jurisdiction, the Court  
13 may review extrinsic evidence beyond the complaint without converting a  
14 motion to dismiss into one for summary judgment. *Safe Air for Everyone v.*  
15 *Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). Even the table feet, which  
16 measure 2 inches high, would not have been an impediment to Johnson had  
17 he chosen to sit at an ordinary table. His footrests, as can be seen from  
18 Exhibit H, appear to be at least 2 inches off the ground. Johnson’s  
19 wheelchair would have had no difficulty sliding above the feet.  
20  
21  
22  
23  
24  
25  
26

27 The upshot is this: Johnson could have easily dined at any table at the  
28

1 restaurant. (see Exhibits B, C, and F). Other wheelchair bound customers  
 2 do. (see Exhibit G).  
 3

4 Johnson is silent as to how he has been harmed by the alleged  
 5 unavailability of accessible dining tables. For instance, what exactly would  
 6 have occurred had he actually attempted to use a table without the leaves  
 7 extended, or one with the leaves extended. Would he have found the  
 8 configuration shown in Exhibits B, C and F to be unacceptable to him. They  
 9 do, after all, provide ample clearance for his wheelchair.  
 10  
 11  
 12

13 The *Chapman* court recognized that “once a disabled plaintiff has  
 14 encountered a barrier violating the ADA, that plaintiff will have a personal  
 15 stake in the outcome of the controversy so long as his or her suit is limited  
 16 to barriers related to that person's *particular disability*.” *Chapman*, 631 F.3d  
 17 at 947. A plaintiff “cannot satisfy the demands of Article III by alleging a  
 18 bare procedural violation.” *Spokeo*, 136 S.Ct. at 1550.  
 19  
 20  
 21

22 **c. Johnson Has Not Alleged Facts Demonstrating the Likelihood of**  
 23 **Future Injury**  
 24

25 Johnson must show at each stage of the proceedings either that he  
 26 is deterred from returning to the facility or that he intends to return to  
 27  
 28

1 the facility and is therefore likely to suffer repeated injury. He lacks  
2 standing if he is indifferent to returning to the Property or if his  
3 alleged intent to return is not genuine, or if the alleged barriers do not  
4 pose a real and immediate threat. *Chapman*, 631 F.3d 939, 953.  
5  
6

7 Even if Johnson sufficiently alleged that he personally encountered  
8 an architectural barrier, he fails to establish a likelihood of future  
9 injury. “In evaluating whether an ADA plaintiff has established a  
10 likelihood of future injury, courts have looked to: (1) the proximity of  
11 the place of public accommodation to plaintiff's residence, (2)  
12 plaintiff's past patronage of defendant's business, (3) the  
13 definitiveness of plaintiff's plans to return, and (4) plaintiff's  
14 frequency of travel near defendant.” *Molski v. Kahn Winery*, 405 F.  
15 Supp.2d 1160, 1163 (C.D. Cal. 2005); *Chapman*, 631 F.3d at 949-50.  
16  
17 The Complaint is silent as to Mr. Johnson's residence, the number of  
18 times he has previously dined at the restaurant, and the reasons why  
19 he wishes to return to the restaurant. Simply alleging that he has an  
20 intent to return "some day" is insufficient for standing purposes.  
21  
22  
23  
24  
25

26 Johnson has filed several thousand lawsuits, alleging plans to revisit  
27  
28

1 each property. The allegation is implausible.

2  
3 **IV. CONCLUSION**

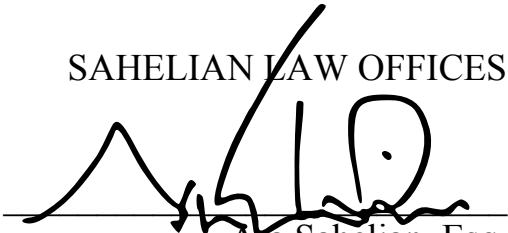
4 Johnson will have to allege well pleaded facts, and not legal conclusions,  
5 to state a claim for relief. But he cannot. His allegation that he was denied  
6 full and equal access is not supported by the facts.  
7

8 Johnson has had two opportunities, now, to draft a proper complaint. He  
9 has not. The first amended complaint should be dismissed with prejudice.  
10 For all the foregoing reasons Johnson's complaint must be dismissed.  
11

12  
13 Respectfully submitted:

14 Date: 6/23/2021

15  
16 SAHELIAN LAW OFFICES

17  
18   
19 Ara Sahelian, Esq.  
20  
21  
22  
23  
24  
25  
26  
27  
28